

Response to Hearing Question Posed by Senator Ron Wyden (D-OR)
SSCI Nomination Hearing – Lieutenant General Timothy D. Haugh
12 July 2023

QUESTION: With a few exceptions, the National Security Agency (NSA) currently requires a probable cause determination for U.S. person queries of communications collected pursuant to E.O. 12333. Is there any reason that standard could not be applied to U.S. person queries of communications collected under Section 702 of FISA?

RESPONSE:

My answer below is predicated on my current understanding of the issue, noting that in my current role I am not directly involved in the oversight of NSA's use of FAA Section 702.

E.O. 12333 and FISA Section 702 are distinct collection authorities with different governing procedures to address differences in the privacy and civil liberties concerns unique to each authority. The procedures governing these authorities have been carefully crafted through a thoughtful, deliberative process that resulted in approval by the Attorney General after consultation with the Director of National Intelligence for E.O. 12333 and by multiple judges on the Foreign Intelligence Surveillance Court (FISC) over the course of many years for 702. I understand that under the Attorney General-approved guidelines for E.O. 12333, a probable cause standard applies to a prescribed subset of U.S. person queries into E.O. 12333 data. I also understand that the FISC-approved standard for queries into FISA Section 702 data (including U.S. person queries) is that they must be reasonably likely to retrieve foreign intelligence information. I understand that there are technical, operational, and legal reasons for the differences and that each of these standards has been carefully considered at the time of adoption, and, with regards to the FISC-approved standard for queries into FISA Section 702 data, that standard is carefully considered by the FISC at every 702 renewal. In my opinion, the Attorney General and FISC have approved appropriate procedures for each of these authorities. Further, each set of procedures is well tailored to protect privacy and civil liberties in the distinct contexts presented by the unique characteristics and limitations of the data acquired pursuant to each authority. I do not believe that the E.O. 12333 U.S. person query standards could be applied effectively to data collected under FISA Section 702 authority without impairing NSA's ability to identify timely and actionable foreign intelligence.

Further, it is my understanding that E.O. 12333 activities are governed by the SIGINT Annex, which permits U.S. person queries in a range of circumstances. Certain, but not all, U.S. person queries in 12333 data require a finding by the Attorney General that there is probable cause to believe that the U.S. individual is an agent of a foreign power. Other types of U.S. person queries in 12333 can be approved internally by NSA personnel, with varying requirements and limitations. The applicable standard depends on the circumstances of the query, and the type of 12333 data being queried. For example, no probable cause determination is required if the pool of data to be queried is limited to the communications of certain foreign intelligence targets, or when the subject of the query is the victim of a foreign cyber attack, a hostage, or has given consent. Importantly, no U.S. person queries into 12333 data require a

separate finding of probable cause from the FISC; all such determinations are conducted within the Executive Branch, or may be based on existing FISC decisions on FISA applications

With respect to FISA Section 702, information acquired through the compelled assistance of U.S.-based electronic communications service providers is tailored and precise—specific to the communications of non-U.S. persons located outside of the United States who are expected to communicate foreign intelligence as defined by the specific intelligence topics that are authorized in certifications approved by the FISC. NSA's Section 702 Querying Procedures account for this precision and permit the use of U.S. person queries that are reasonably likely to retrieve foreign intelligence information. NSA recognizes the sensitivity associated with the use of U.S. person query terms to review Section 702-acquired information and has deployed specialized training, technology, and policy protections to ensure that it uses U.S. person query terms compliantly. All such queries are subject to review by the Department of Justice, and any errors in the use of U.S. person query terms must be reported to the FISC.

NSA's use of U.S. person query terms is limited, carefully controlled, and subject to robust internal and external oversight. Restricting NSA's authority to conduct queries using U.S. person query terms in Section 702 data, including requiring a probable cause determination or prior FISC authorization on some or all such queries, would undermine the effectiveness of the tool for national security purposes in several ways. First, it would create a significant administrative burden and time delay in a process that is valuable particularly for its efficiency. When time is of the essence, such a change may require NSA to identify alternative means of locating critical foreign intelligence. In many circumstances, it would be extremely challenging, if not impossible, to pinpoint this information in time to protect U.S. national security interests, including victims of malicious cyber activity, hostages, or targets of malign activity by hostile foreign intelligence services. Second, it is unclear what would be the required showing under a blanket requirement for probable cause. For the limited examples of U.S. person queries into E.O. 12333 data that require a probable cause determination by the Attorney General, the standard is probable cause to believe that the U.S. person is an agent of a foreign power. However, for many of the permissible query purposes under 702 - like many of the permissible query purposes under E.O. 12333 - that standard could not be met. For example, U.S. persons who have been taken hostage, who are the victims of malicious cyber activity, or who are being targeted by a hostile foreign intelligence service are not agents of a foreign power. If NSA were required to demonstrate probable cause to believe they are, then NSA would lose the ability to run the very queries that are most essential to protecting victims of foreign intelligence threats. For all of these reasons, it is my view that the carefully crafted procedures that have been approved by the Attorney General for E.O. 12333 and by the FISC for Section 702 strike the right balance in supporting the government's ability to detect and counter vital national security threats while protecting the privacy and civil liberties of Americans.

As noted at the outset, this position is based on my current understanding. I also understand that the Administration and the Congress are currently considering a variety of reforms to U.S. person queries into Section 702 data. If confirmed, I look forward to studying this issue further and participating in those discussions. I commit to further engagement with the Senator on this and other important matters.